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Attorneys for Pender Capital Asset Based Lending  
Fund I, LP

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

In re:

THEOS FEDRO HOLDINGS, LLC

Debtor.

Case No. 21-30202

Chapter 11

Date: March 16, 2022

Time: 10:30 a.m.

Place: AT&T Connect Teleconference or  
Zoom Video Conference

Judge: Honorable Dennis Montali

**PENDER CAPITAL ASSET BASED LENDING FUND I, LP'S OBJECTIONS TO  
TRUSTEE'S [PROPOSED] ORDER ON TRUSTEE'S MOTION (I) TO SELL REAL  
PROPERTY FREE AND CLEAR OF LIENS AND INTERESTS; (II) TO PAY REAL  
ESTATE COMMISSION AND VOLUNTARY DEEDS OF TRUST, IF UNDISPUTED,  
AND CLOSING COSTS OUT OF ESCROW; AND (III) TO PAY SPECIFIED OTHER  
ENCUMBRANCES (819 ELLIS STREET, SAN FRANCISCO, CA 94109**

Pender Capital Asset Based Lending Fund I, LP ("Pender Capital"), a secured creditor and party in interest, hereby objects to the Trustee's [Proposed] Order on Trustee's Motion to Sell Real Property Free and Clear of Liens, as follows. Pender has met and conferred with the Trustee's counsel regarding the objections and the Trustee's counsel has refused to modify the Proposed Order in any respect. Therefore, Pender Capital asks the Court to make these modifications to conform the Proposed Order to the Court's rulings and the requirements of the Bankruptcy Code.

1       **Proposed Order Paragraph 7 states:** “The Trustee is authorized to pay any undisputed  
2       liens/encumbrances from escrow.”

3       **Pender Capital’s Objection:** This provision should be struck or modified. It does not  
4       specify who has the power to declare a lien or encumbrance “undisputed” and qualified for  
5       payment and appears to give the Trustee the unilateral right to so decide whether a lien is  
6       undisputed and may be paid. As set forth in Pender Capital’s Opposition to the Sale motion, and  
7       as acknowledged at the hearing, there is a priority dispute between Pender and the Department of  
8       Labor and any other liens or encumbrances asserting priority over Pender, with the exception of  
9       Wells Fargo and the Code Enforcement (Paragraph 11). This Paragraph 7 is not necessary for  
10      payment of Wells Fargo and the Code Enforcement liens as payment of those liens and  
11      encumbrances are specifically authorized by Paragraphs 10 and 11, respectively. Therefore, this  
12      provision applies to other unspecified liens. Pender Capital asserts that it has priority over any  
13      other such claims. Bankruptcy Code Section 363(e) requires, and the Court ruled at the hearing,  
14      that the net proceeds of the sale would be held pending resolution of the priority dispute.  
15      Therefore, Pender requests this this provision be struck from the Order or modified to clarify that  
16      the determination that a lien or encumbrance is undisputed and qualified for payment be  
17      conditioned on both Pender Capital and the Department of Labor stipulating to the payment.

18       **Proposed Order Paragraph 12 states in the opening paragraph:**

19       The Trustee is authorized to sell the Property under Bankruptcy Code 363(f)(2) or (4) free  
20       and clear of the following liens and interests, with those liens and interests reattaching to  
21       the proceeds of sale to the same extent, validity and priority as they attached to the  
22       Property prior to the sale.

22       **Pender Capital’s Proposed Amendment and Objection:**

23       Pender Capital requests that the phrase underlined below be added to the Proposed Order.

24       The Trustee is authorized to sell the Property under Bankruptcy Code 363(f)(2) or (4) free  
25       and clear of the following liens and interests, with those liens and interests reattaching to  
26       the proceeds of sale to the same extent, validity and priority as they attached to the  
27       Property prior to the sale, with such proceeds to be held pending further order of the Court  
28       or stipulation to release by the Trustee, Pender Capital, and the Department of Labor.

1 This additional language is standard in bankruptcy court orders authorizing the sale of  
2 property free and clear of liens pursuant to Bankruptcy Code Section 363(f). It is necessary and  
3 appropriate to adequately protect the secured creditors' interests in the sale proceeds as required  
4 by Bankruptcy Code Section 363(e) and Pender understood the Court's ruling at the hearing to  
5 provide that the sale proceeds would be held pending further order of the Court, which may be  
6 entered pursuant to a stipulation by the Trustee, the Department of Labor and Pender if they are  
7 able to resolve their disputes noting that the Settlement Conference remains ongoing. Simply  
8 attaching the lenders' liens to the net sale proceeds is not sufficient. The Court's order should  
9 adequately protect the secured creditors' interests by conditioning any disbursement of the funds  
10 on a further order of the Court.

11 **Proposed Order Paragraph 15 states:** "Pending further order of the Court, the Trustee  
12 is authorized to receive from escrow the Buyer's \$300,000 deposit."

13 **Pender Capital's Proposed Amendment and Objection:**

14 Pender Capital requests that paragraph 15 be modified to state:

15 "The Trustee is authorized to receive from escrow the Buyer's non-refundable \$300,000  
16 deposit, which shall be retained by the Estate in the event that the Buyer fails to close the sale of  
17 the Property by December 30, 2022 and shall only be returned to the Buyer upon entry of an order  
18 of the Court declaring a material breach of the Sale Agreement by Trustee."

19 Pender Capital submits that these terms were an important consideration in the Court's  
20 ruling and were based upon the representations of the Trustee's Counsel. No contract documents  
21 stating these terms have been filed by the Trustee before the hearing or otherwise and none were  
22 provided in the meet and confer process regarding the proposed order. Therefore, it is appropriate  
23 to clarify these terms in the Order so that all of the parties are moving forward with a clear  
24 understanding and to avoid the potential for unnecessary disputes if the Buyer should fail to close  
25 by December 30, 2022. To the extent the Buyer's commitment is to be verified, given that the

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1 Buyer did not attend the hearing, the Court suggested at the hearing having the Buyer sign off on  
2 the Order with these terms, which would be an appropriate resolution.

3 Dated: March 23, 2022

4 FELDERSTEIN FITZGERALD WILLOUGHBY  
5 PASCUZZI & RIOS LLP

6 By: /s/ Jason E. Rios  
7 Jason E. Rios  
8 Attorneys for Pender Capital Asset Based Lending  
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/s/ Susan R. Darms

Susan R. Darms